

**BEFORE THE APPEALS BOARD  
FOR THE  
KANSAS DIVISION OF WORKERS COMPENSATION**

**PAUL GALLAGHER**  
Claimant

VS.

**KEESECKER AGRI BUSINESS, INC.**  
Respondent

AND

**KANSAS EMPLOYERS WORKERS  
COMPENSATION FUND**  
Insurance Carrier

Docket No. **1,053,366**

**ORDER**

Claimant requests review of the October 24, 2013, Award by Administrative Law Judge (ALJ) Rebecca Sanders. The Board heard oral argument on February 11, 2014.

**APPEARANCES**

Lawrence Gurney of Wichita, Kansas, appeared for claimant. Ronald Laskowski of Topeka, Kansas, appeared for respondent and its insurance carrier (respondent).

**RECORD AND STIPULATIONS**

The Board has considered the entire record and adopts the stipulations listed in the Award.

**ISSUES**

Claimant sustained personal injury by repetitive traumas arising out of and in the course of his employment on April 22, 2010.<sup>1</sup> The ALJ found that, as a result of the series of accidental injuries, claimant sustained a 5% permanent functional impairment to the whole body followed by multiple periods of work disability.

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<sup>1</sup> The parties stipulated to this accident date. R.H. at 4.

Claimant contends the ALJ erred in placing any weight on Dr. Estivo's functional impairment and task loss opinions. Claimant maintains the appropriate task loss is 23.5% and the appropriate impairment of function is 10% to the whole body, based on Dr. Flutter's opinions. Claimant also contends the ALJ erred in computing the permanent partial disability (PPD) benefits to which claimant is entitled.

Respondent argues the ALJ erred in placing any weight on the impairment and task loss opinions of Dr. Flutter. Respondent maintains Judge Sanders "erroneously determined that claimant had suffered a permanent injury and awarded functional impairment and work disability."<sup>2</sup>

The issues for Board determination are:

1. What is the nature and extent of claimant's disability, including functional impairment and work disability?
2. Are the Award's PPD computations correct?

#### **FINDINGS OF FACT**

Having reviewed the evidentiary record, the stipulations of the parties, and having considered the parties' briefs and oral arguments, the Board makes the following findings:

For approximately nine years, claimant worked for respondent as a feed mill manager. Claimant testified his work was very physically demanding. At times, he had to unload trucks by hand because mechanical assistance was unavailable. Claimant was required to fill microhoppers to mix feed, which required claimant to lift 50-pound bags multiple times per day. At times, claimant had to unload 1,000-pound pallets made up of 50-pound bags. He described his work as follows:

I would have to haul 50-pound bags up half a flight of stairs and then dump them into the hoppers that were shoulder high. Would mix in -- make sure it had all the micronutrients and would mix 12 tons of feed, load it on the trucks, deliver the 12 tons, and then would start the process all over again.<sup>3</sup>

In the spring of 2010, claimant developed pain in his lower back. He alleged he injured his low back and both hips as a result of his work activities. He testified as follows:

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<sup>2</sup> Respondent's Brief at 1 (filed Jan. 15, 2014).

<sup>3</sup> R.H. by Depo. at 6.

Q. How were you injured working at Keesecker?

A. Lifting 50-pounds bags and carrying them up half a flight of stairs.

Q. Did this occur on one occasion?

A. It was my daily job to do it. Just at that time the pain became acute, in the spring of 2010.

Q. Your nine years you worked there, was lifting 50-pound bags part of your regular job duties?

A. That is correct.<sup>4</sup>

Respondent directed claimant to Dr. David Hodgson for medical treatment, which consisted of physical therapy, muscle relaxants and pain medication. After claimant was terminated from respondent's employ on May 25, 2010, he was no longer treated by Dr. Hodgson.

Claimant testified he had no problems with his lower back or his hips before the spring of 2010.

Claimant was evaluated by Dr. John Estivo at respondent's request on February 28, 2011. Dr. Estivo took a history, performed a physical examination, and recommended a lumbar MRI scan. The scan, conducted on March 7, 2011, revealed a herniated disk at L4-5 towards the right. Dr. Estivo recommended an epidural steroid injection and imposed temporary work restrictions. Dr. Estivo prescribed medication and recommended claimant follow up with an orthopedic surgeon or a neurosurgeon.

Dr. Estivo examined claimant for the final time on September 6, 2013. The doctor reviewed updated medical records, took a history and performed another physical examination. Dr. Estivo found no signs or symptoms of radiculopathy. Claimant's symptoms were limited to lumbar spine aching in the mornings. In Dr. Estivo's opinion, claimant's impairment should be determined by the preferred method of rating under the *AMA Guides*<sup>5</sup>: the DRE injury model rather than the range of motion model.

On March 13 and April 24, 2012, claimant was evaluated by Dr. Robert Lowe, an orthopedic surgeon, regarding lower back pain. Dr. Lowe advised claimant he was not a surgical candidate and recommended over-the-counter pain medication.

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<sup>4</sup> Gallagher Depo. (Jan. 25, 2011) at 6.

<sup>5</sup> American Medical Association, *Guides to the Evaluation of Permanent Impairment* (4th ed.). All references are based upon the fourth edition of the *AMA Guides* unless otherwise noted.

Based upon the *AMA Guides*, Dr. Estivo placed claimant in DRE Lumbosacral Category I, which resulted in a 0% permanent impairment to the lumbar spine. Dr. Estivo imposed no permanent restrictions and found no further medical treatment was needed. Dr. Estivo reviewed the list of claimant's former work tasks prepared by Jerry Hardin, a personnel consultant, and concluded claimant could perform all of the 17 non-duplicated tasks for a 0% task loss.

On July 25, 2012, Dr. George Flutter, who is board certified in physical medicine and rehabilitation, evaluated claimant at the request of his attorney. The doctor reviewed medical records, took a history and conducted a physical examination. Dr. Flutter's diagnoses were low back pain, lumbosacral strain/sprain and lumbar discopathy at L4-5. In Dr. Flutter's opinion, claimant's work injury caused or contributed to his current condition.

Based on the *AMA Guides*, Dr. Flutter placed claimant in DRE Lumbosacral Category III, for a 10% whole body permanent impairment for claimant's low back. Dr. Flutter imposed these restrictions: (1) no lifting, carrying, pushing or pulling over 35 lbs. occasionally and 15 lbs. frequently, and (2) limit bending, stooping, crouching and twisting to an occasional basis. Dr. Flutter reviewed the list of 17 work tasks prepared by Mr. Hardin and concluded claimant cannot perform 4 of the 17 tasks, for a 23.5% task loss. Dr. Flutter made no specific treatment recommendations.

With regard to his rating, Dr. Flutter testified:

- Q. Well, let's put it this way: [claimant] did not have radiculopathy verified by EMG or any other diagnostic test, right?
- A. That is correct.
- Q. And he did not have any of the other differentiators identified in the DRE Category III, such as a fracture; is that correct?
- A. That is correct.<sup>6</sup>

Mr. Hardin conducted an interview with claimant via telephone on July 18, 2012, at the request of claimant's attorney. He prepared a list of 17 non-duplicated work tasks claimant performed in the 15-year period before his injury.

Claimant testified that depending upon the level of his activity, he has good days and bad days regarding his back pain. He testified high humidity and prolonged standing and walking negatively affect his back. Claimant takes over-the-counter medication for his pain.

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<sup>6</sup> Flutter Depo. at 19.

Claimant's post-injury employment is accurately set forth on page 4 of the Award and it would serve no purpose to repeat those findings. No party challenges the accuracy of such findings, nor is there any challenge to the ALJ's findings regarding the periods of claimant's post-injury wage loss. The Award provides:

Claimant has had more than [a] ten percent wage loss despite having employment after the injury. . . .

Claimant's wage loss is as follows: one hundred percent wage loss at least until May 14, 2011; between May 14, 2011 and December 31, 2011 a sixty-nine percent wage loss; between January 1, 2012 and June 13, 2013 a 40.38 percent wage loss and; from June 13, 2013 to the present a 32.28 percent wage loss.<sup>7</sup>

### **PRINCIPLES OF LAW AND ANALYSIS**

If in any employment to which the workers compensation act applies, personal injury by accident arising out of and in the course of employment is caused to an employee, the employer shall be liable to pay compensation to the employee in accordance with the provisions of the workers compensation act.<sup>8</sup>

In workers compensation litigation, it is the claimant's burden to prove his or her entitlement to benefits by a preponderance of the credible evidence.<sup>9</sup>

"Burden of proof" means the burden of a party to persuade the trier of fact by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record.<sup>10</sup>

The existence, nature and extent of the disability of an injured worker is a question of fact.<sup>11</sup> A workers compensation claimant's testimony alone is sufficient evidence of the claimant's physical condition.<sup>12</sup> The finder of fact is free to consider all the evidence and decide for itself the percent of disability the claimant suffers.<sup>13</sup>

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<sup>7</sup> ALJ Award (Oct. 24, 2013) at 8.

<sup>8</sup> K.S.A. 2010 Supp. 44-501(a).

<sup>9</sup> K.S.A. 2010 Supp. 44-501(a) and K.S.A. 2010 Supp. 44-508(g).

<sup>10</sup> K.S.A. 2010 Supp. 44-508(g).

<sup>11</sup> *Armstrong v. City of Wichita*, 21 Kan. App. 2d 750, 907 P.2d 923 (1995), *rev. denied* 259 Kan. 927 (1996).

<sup>12</sup> *Hanson v. Logan U.S.D.* 326, 28 Kan. App. 2d 92, 11 P.3d 1184 (2000), *rev. denied* 270 Kan. 898 (2001).

<sup>13</sup> *Carter v. Koch Engineering*, 12 Kan. App. 2d 74, 76, 735 P.2d 247, *rev. denied* 241 Kan. 838 (1987).

It is the function of the trier of fact to decide which testimony is more accurate and/or credible and to adjust the medical testimony along with the testimony of the claimant and any other testimony that may be relevant to the question of disability. The trier of fact is not bound by medical evidence presented in the case and has a responsibility of making its own determination.<sup>14</sup> Medical evidence is not essential to the establishment of the existence, nature and extent of an injured worker's disability.<sup>15</sup>

K.S.A. 2010 Supp. 44-510e(a) states in part:

Permanent partial general disability exists when the employee is disabled in a manner which is partial in character and permanent in quality and which is not covered by the schedule in K.S.A. 44-510d and amendments thereto. The extent of permanent partial general disability shall be the extent, expressed as a percentage, to which the employee, in the opinion of the physician, has lost the ability to perform the work tasks that the employee performed in any substantial gainful employment during the fifteen-year period preceding the accident, averaged together with the difference between the average weekly wage the worker was earning at the time of the injury and the average weekly wage the worker is earning after the injury. In any event, the extent of permanent partial general disability shall not be less than the percentage of functional impairment. Functional impairment means the extent, expressed as a percentage, of the loss of a portion of the total physiological capabilities of the human body as established by competent medical evidence and based on the fourth edition of the American Medical Association Guides to the Evaluation of Permanent Impairment, if the impairment is contained therein. An employee shall not be entitled to receive permanent partial general disability compensation in excess of the percentage of functional impairment as long as the employee is engaging in any work for wages equal to 90% or more of the average gross weekly wage that the employee was earning at the time of the injury. . . . The amount of weekly compensation for permanent partial general disability shall be determined as follows:

(1) Find the payment rate which shall be the lesser of (A) the amount determined by multiplying the average gross weekly wage of the worker prior to such injury by 66⅔% or (B) the maximum provided in K.S.A. 44-510c and amendments thereto;

(2) find the number of disability weeks payable by subtracting from 415 weeks the total number of weeks of temporary total disability compensation was paid, excluding the first 15 weeks of temporary total disability compensation that was paid, and multiplying the remainder by the percentage of permanent partial general disability as determined under this subsection (a); and

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<sup>14</sup> *Tovar v. IBP, Inc.*, 15 Kan. App. 2d 782, 817 P.2d 212, *rev. denied* 249 Kan. 778 (1991).

<sup>15</sup> *Chinn v. Gay & Taylor, Inc.*, 219 Kan. 196, 547 P.2d 751 (1976).

(3) multiply the number of disability weeks determined in paragraph (2) of this subsection (a) by the payment rate determined in paragraph (1) of this subsection (a).

The resulting award shall be paid for the number of disability weeks at the full payment rate until fully paid or modified. If there is an award of permanent disability as a result of the compensable injury, there shall be a presumption that disability existed immediately after such injury. In any case of permanent partial disability under this section, the employee shall be paid compensation for not to exceed 415 weeks following the date of such injury, subject to review and modification as provided in K.S.A. 44-528 and amendments thereto.

The Board finds the Award should be affirmed as modified to correct an inaccuracy in the Award's PPD calculations.

The ALJ's findings regarding permanent impairment of function and task loss (5% to the body and 11.75 % task loss respectively) are mid-way between the opinions of Dr. Estivo and Dr. Fluter. The Board agrees that each of the ratings and task loss opinions were entitled to equal weight. There was no basis on which to conclude that the testimony of either physician was so lacking in credibility as to justify its exclusion in determining claimant's task loss and permanent functional impairment. The Board affirms the ALJ's findings and conclusions regarding claimant's functional impairment and task loss.

No issue has been raised regarding claimant's post-injury wage loss. No issue has been raised about, assuming claimant's task loss is 11.75%, the ALJ's conclusions regarding claimant's work disability. The ALJ's findings and conclusions with regard to work disability are supported by a preponderance of the credible evidence and are adopted by the Board.

Claimant argues that the Award's PPD calculations should be corrected as follows:

A) 11.75% task loss:

According to *Rivera-Garay*, one must start from the original disability calculations. ALJ Sanders concluded that Mr. Gallagher initially suffered a 56% disability from the date of the injury (April 22, 2010) through May 14, 2011. The calculations would be: 415 weeks minus no weeks of TTD = 415 times 56% disability or 232.4 weeks of PPD (potentially to be paid). As of May 14, 2011, [claimant] would have received 55.29 weeks of PPD. After May 14, 2011 and through December 31, 2011, Mr. Gallagher's disability was reduced to 40.4%. The calculations would be: 415 weeks minus 0 weeks of TTD = 415 times 40.4% = 167.66 less 55.29 weeks of PPD that are to be paid = 112.37 weeks. However there are only 88.29 weeks between the date of accident and December 31, 2011 so only 88.29 weeks of PPD would be due as of that date. After December 31, 2011 and through June 13, 2013, Mr. Gallagher's disability was reduced to 26%.

The calculations would be: 415 weeks minus 0 weeks of TTD = 415 times 26% = 107.90 less 88.29 weeks of PPD that are to be paid = 19.61 weeks. There would be up to 164.0 weeks between the date of accident and June 13, 2013 so all of the additional weeks (19.61) would be added to the prior 88.29 and would be payable prior to June 13, 2013. After June 13, 2013 through the present, Mr. Gallagher's disability was reduced to 22% which would only allow 91.3 weeks of PPD ( $415 - 0 = 415 \times 22\% = 91.3$ ). The Award would already have paid 107.90 weeks ( $88.29 + 19.61 = 107.90$ ) so no additional PPD would be owed.

107.90 weeks of PPD at the rate of \$546.00 per week that would be payable prior to June 13, 2013 or \$58,913.40. The Award, even based on the findings therein, erroneously allowed for a total amount due of only \$49,849.80.<sup>16</sup>

The Board agrees that the PPD computations in the Award must be modified to comply with K.S.A. 2010 Supp. 44-510e and applicable case law.<sup>17</sup> The award is modified as follows:

1. Claimant is entitled to a maximum of 107.9 weeks of permanent partial disability benefits based on a work disability of 26%.
2. Based on a 56% work disability, claimant is entitled to 55.14 weeks of PPD at the rate of \$546 per week, from April 22, 2010 through May 13, 2011, totaling \$30,106.44.
3. Based on a 40.4% work disability, claimant is entitled to 33.14 weeks of PPD at the rate of \$546 per week, from May 14, 2011 through December 31, 2011, totaling \$18,094.44.
4. Based on a 26% work disability, claimant is entitled to 19.62 weeks PPD at the rate of \$546 per week, from January 1, 2012 through June 13, 2013, totaling \$10,712.52.
5. The total award is \$58,913.40, all of which is due and owing in one lump sum less amounts previously paid.

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<sup>16</sup> Claimant's Brief (filed Dec. 16, 2013) at 2-3.

<sup>17</sup> *Wheeler v. Boeing Co.*, 25 Kan. App. 2d 632, 967 P.2d 1085 (1998), *rev. denied* 266 Kan. 1116 (1999); *Childres v. Via Christi*, No. 1,045,369, 2013 WL 5983241 (Kan. WCAB Oct. 29, 2013); *Rivera-Garay v. McCrite Plaza Retirement Comm.*, No. 1,000,191, 2010 WL 517308 (WCAB Jan. 29, 2010); *Juett v. State of Kansas*, Nos. 241,926, 1,034,321 & 1,042,037, 2012 WL 369763 (Kan. WCAB Jan 10, 2012); *Bell v. Boeing Company*, No. 239,082, 2003 WL 1918538 (Kan. WCAB Mar. 31, 2003).

**CONCLUSIONS OF LAW**

1. The Board affirms the ALJ's determination of the nature and extent of claimant's disability.
  - a. Claimant's permanent functional impairment is 5% to the whole body.
  - b. Claimant's task loss is 11.75%.
  - c. Claimant is entitled to PPD based on work disability as set forth in detail above and in the "AWARD" section below.
2. The PPD calculations on page 9 of the Award are modified as set forth in this Order.

As required by the Workers Compensation Act, all five members of the Board have considered the evidence and issues presented in this appeal.<sup>18</sup> Accordingly, the findings and conclusions set forth above reflect the majority's decision and the signatures below attest that this decision is that of the majority.

**AWARD**

Claimant is entitled to 55.14 weeks of permanent partial disability compensation at the rate of \$546.00 per week or \$30,106.44 for a 56% work disability followed by 33.14 weeks of permanent partial disability compensation at the rate of \$546.00 per week or \$18,094.44 for a 40.4% work disability followed by 19.62 weeks of permanent partial disability compensation at the rate of \$546.00 per week or \$10,712.52 for a 26% work disability, making a total award of \$58,913.40.

As of July 15, 2014, there would be due and owing to claimant 107.9 weeks of permanent partial disability compensation at the rate of \$546.00 per week in the sum of \$58,913.40, for a total due and owing of \$58,913.40, which is ordered paid in one lump sum less amounts previously paid.

**WHEREFORE**, it is the Board's decision that the Award of ALJ Rebecca Sanders dated October 24, 2013, is affirmed as modified.

**IT IS SO ORDERED.**

Dated this \_\_\_\_\_ day of July, 2014.

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<sup>18</sup> K.S.A. 2010 Supp. 44-555c(k).

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BOARD MEMBER

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BOARD MEMBER

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BOARD MEMBER

c: Lawrence Gurney, Attorney for Claimant,  
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Honorable Rebecca Sanders, ALJ